

# Book Review

ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925  
By Susan Lehrer. Albany: State University of New York Press, 1987.  
Pp. viii, 318. \$44.50 cloth; \$14.95 paper.

Reviewed by Reva Siegel†

The Supreme Court's decision in *Muller v. Oregon*<sup>1</sup> ratifying protective legislation for women has led a varied life. Initially viewed as a victory for labor, reflecting the emergence of social realism in constitutional jurisprudence, by the 1970s *Muller* was attacked as an exemplar of sexist and paternalistic reasoning, the regime of sex-based distinctions it sanctioned challenged by women demanding formal equality at law.<sup>2</sup> In the 1980s, as women have increasingly come to question the sufficiency of a formal conception of equality, it is not surprising that *Muller* should receive renewed attention. The case figured prominently in debates over the equities of a sex-specific claim to employment leave for childbearing purposes<sup>3</sup> prompted by *California Federal Savings & Loan Association v. Guerra*.<sup>4</sup> No longer a rallying point of women's advocacy, *Muller* now stands at the heart of feminist controversy, invoked by feminists defending formalist principles of equality against feminist challenge, to dramatize the danger their breach entails.<sup>5</sup> Most recently commentary has

---

† Joining the law faculty at University of California, Berkeley in fall, 1988. B.A. 1978, M.Phil. 1982, J.D. 1986, Yale University.

<sup>1</sup> 208 U.S. 412 (1908).

<sup>2</sup> Compare Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 364-65 (1916) with J. BAER, THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 61-67 (1978).

<sup>3</sup> See, e.g., Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1129-30 (1986); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196 (1983); cf. Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 16-17 (1985) (protective legislation).

<sup>4</sup> 107 S. Ct. 683 (1987). Two cases in fact played a role in precipitating the maternity leave controversy: *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, and *Miller-Wohl Co. v. Commissioner of Labor and Indus.*, 692 P.2d 1243 (Mont. 1984), *vacated on appeal*, 107 S. Ct. 919 (for further consideration in light of *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683), *judgment reinstated*, 44 Mont. 1718, 744 P.2d 871 (1987).

<sup>5</sup> See, e.g., Taub & Williams, *Will Equality Require More Than Assimilation. Accommodation or Separation From the Existing Social Structure?*, 37 RUTGERS L. REV./1 CIV. RTS. DEVS. 825, 831-35 (1985); Taub, Book Review, 80 COLUM. L. REV. 1686, 1691-92 (1980) (reviewing C.

begun to focus on women's role in securing and defending the sex-based legislation *Muller* sanctioned—the case now posing questions about the politics of feminist advocacy itself.<sup>6</sup>

For those interested in a closer examination of the historical referents in this controversy, *Origins of Protective Labor Legislation for Women, 1905-1925*<sup>7</sup> offers an ambitious, although problematic, account of the politics of the sex-based regulatory regime. Susan Lehrer is by no means the first to examine this controversial chapter in welfare reform and women's advocacy, but she is one of the first to scrutinize the record in the wake of the contemporary feminist debate.<sup>8</sup> Drawing on a rich array of sources, Lehrer examines the motives and attitudes of the diverse parties who promoted and contested regulation of women's employment in the opening decades of this century. She devotes particular attention to the acrimonious debate over the legislation that divided the women's movement after passage of the nineteenth amendment. Her principal object is to make political sense of the episode. Why did the legislation appear, and whose interests did it serve?

The answers she supplies may well gratify those who see in *Muller* the perennial dangers of sex-specific regulation, and the possibilities of misguided feminist advocacy. Lehrer contends that protective legislation worked to subordinate women's position in the market to their role in the family, and thus to reinforce the forms of women's unwaged and underwaged work. In both respects, Lehrer argues, the legislation served the interests of the business classes, and was in fact enacted to achieve this end. (pp. 227-29, 234-36)<sup>9</sup> However, Lehrer's own evidence calls into question the adequacy, as well as accuracy, of this account. Having undertaken the ambitious task of analyzing advocacy of protective legislation in light of the interests it served, Lehrer presents for us at a more complex level the difficulties in coming to terms with this episode in history. If the questions her book raises are in important respects more

---

MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979)).

<sup>6</sup> See, e.g., S. HEWLETT, A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA 211-18 (1986); Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois, 1869-1895*, 84 MICH. L. REV. 1518, 1520-21 (1986); cf. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 68 (1985) (remarks of Ellen DuBois) (protective legislation); Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 570-72 (1983) (protective legislation).

<sup>7</sup> S. LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925* (1987).

<sup>8</sup> Nancy Cott and Frances Olsen have each recently produced significant studies of this episode, which, though considerably shorter than Lehrer's, should be examined alongside it, as they proceed from markedly divergent viewpoints. N. COTT, *THE GROUNDING OF MODERN FEMINISM* 117-42 (1987); Olsen, *supra* note 6. For a review of the literature in this area, see Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 SIGNS 97, 113-15 (1986); Shanley, *Suffrage, Protective Legislation, and Married Women's Property Laws in England*, 12 SIGNS 62, 67-71 (1986).

<sup>9</sup> All parenthetical page references are to S. LEHRER, *supra* note 7.

compelling than the answers it provides, we are nonetheless benefited. The critical significance of this moment of history may well lie in the debates it provokes—not the lessons it supplies.

## I.

Lehrer opens her story at the turn of the century, a period of considerable upheaval in the workplace. As employers attempted to remove production from the control of skilled labor and to maximize profit in an intensely competitive market, growing numbers undertook to reorganize the work process, turning both new industrial technology and the precepts of scientific management to this end. (pp. 19-22) In Lehrer's view, this industrial drama provided a stimulus to regulation in two respects. First, employers attempting to reorganize the work process redistributed tasks among men, women, and machines in a manner that upset all natural distinctions between men's and women's work, illustrating the gendered basis of job definition and compensation in terms that did not escape the attention of contemporary observers. (pp. 23-26, 30) Second, middle-class reformers, while deeply troubled by the persistent segregation and low wages characterizing women's employment, saw in employers' use of scientific management the possibility of "scientific" regulation to remedy labor's plight. (pp. 31-32) In this light Lehrer examines Josephine Goldmark's pioneering study, *Fatigue and Efficiency*,<sup>10</sup> in which Goldmark, who collaborated with Louis Brandeis on a brief for the state in *Muller v. Oregon*,<sup>11</sup> set forth her case that "the need for the short[er] workday rests upon a scientific basis."<sup>12</sup> Because overwork produced fatigued and inefficient workers, the simple facts of human physiology could justify limiting a wage-earner's hours without compromise of an employer's profit. (pp. 34-37)

Lehrer then doubles back to examine the legal context in which proponents of legislative reform built their case for state intervention in the workplace. From the outset, those interested in regulating the employment relationship encountered a judiciary disposed to defend it on constitutional grounds of free contract. While legislative advocates succeeded in persuading courts that regulation of men's employment was justified in narrowly defined occupational circumstances, courts responded to their case for regulation of women's employment in qualitatively different terms. As Lehrer makes clear, state courts in the years prior to *Muller* did strike down protective legislation for women as abridging freedom of contract; but where they upheld it, they focused on the peculiar charac-

---

<sup>10</sup> J. GOLDMARK, *FATIGUE AND EFFICIENCY* (1912).

<sup>11</sup> Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>12</sup> S. LEHRER, *supra* note 7, at 35 (quoting J. GOLDMARK, *supra* note 10, at 38-39) (bracketed material appears in primary source).

teristics of female employees as a class—emphasizing differences in women's legal status, physical structure, reproductive role, and familial obligations. (pp. 56-58)<sup>13</sup> Thus when Brandeis and Goldmark undertook to defend an Oregon law setting maximum hours for women workers by presenting the Supreme Court with empirical evidence demonstrating the physiological effects of fatigue on women, the legal basis of their case was already well established. “[W]omen's position as wives and mothers” defined their position in law, justifying class-based limitations on their employment. (p. 61) The culture supporting the prevailing family and wage structure thus infused legal discourse, making distinctions between male and female employment “reasonable.” (pp. 56, 61)

If the great body of protective legislation directed at women fared well in the courts in the years after *Muller*, Lehrer observes, minimum wage legislation did not. After some years of uncertain reception, in 1923 the Court ruled in *Adkins v. Children's Hospital*<sup>14</sup> that, notwithstanding *Muller's* approval of maximum hours regulation for women, a statute setting a minimum wage for women impermissibly infringed upon their freedom of contract. Lehrer contends that neither the relative intrusiveness of wage regulation, nor incipient feminist criticism of sex-based legislation provides a sufficient explanation for the Court's differential treatment of women's wage and hours laws. Rather, she traces the Court's response to the gender ideology on which the sex-based regulatory regime rested. Societal interest in the performance of women's maternal and domestic responsibilities may have warranted limits on their employment; it did not justify enhancing their wages. (pp. 93, 230-32) Indeed, Lehrer argues, the premise that wage-earning women were nonetheless economically dependent was so widely shared it informed even the legislated wage scales in contention, as well as the documentary studies of working women's poverty generated in their support. (pp. 89, 93)

For Lehrer, then, the Court's tolerance of protective legislation, as it restricted the hours and times during which women might work but not as it increased their wages, appears not only internally coherent, but faithful to the logic of the protective regime as a whole. Premised on assumptions of women's dependency, the legislation tended to reinforce,

---

<sup>13</sup> In 1902, for example, a Nebraska court sustained maximum hours legislation for women against constitutional challenge, emphasizing women's status “to a certain extent, [as] wards of the state,” and reasoning that women's “physical limitations” warranted regulation, as overwork might “render them incapable of bearing their share of the burdens of the family and the home.” *Wenham v. State*, 65 Neb. 395, 405, 91 N.W. 421, 424-25 (1902), *quoted in* S. LEHRER, *supra* note 7, at 57. In that same year, a Washington state court upheld an hours law for women as a proper exercise of the police power, declaring it “logical[ ] . . . that that which would deleteriously affect any great number of women who are the mothers of succeeding generations must necessarily affect the public welfare and the public morals.” *State v. Buchanan*, 29 Wash. 603, 610, 70 P. 52, 54 (1902), *quoted in* S. LEHRER, *supra* note 7, at 58.

<sup>14</sup> 261 U.S. 525 (1923).

rather than disrupt, women's secondary market position. (p. 93) The critical issue thus becomes, "in whose interests these protective labor laws were being passed, and how the different groups defined their interests over time." (pp. 58-59) Lehrer supplies an answer in two parts, first analyzing the advocacy efforts of a diverse array of social groups over the opening decades of this century, then analyzing the functional logic of the regime itself.

Clearly the initial impetus for the legislation came from social reformers, most from the middle class and many of them women. Key support was provided by the National Consumers League (p. 185),<sup>15</sup> and especially, the Women's Trade Union League (WTUL), an association of wage-earning women and middle-class "allies" that relied on both organization and legislation to improve women's laboring conditions. (pp. 115-16, 125-28, 185) As Lehrer notes, until passage of the nineteenth amendment in 1920, the suffrage movement counted adequate protective legislation for women and children among the principal benefits of obtaining the vote. (pp. 99-100) Both citizen advocates and governmental committees across the country produced volumes of evidence documenting the need for such legislation. (p. 185)

Not surprisingly, the legislation was vigorously opposed by employers in the manufacturing and retail sectors of the economy where large numbers of women worked. (p. 186) However, as public acceptance of the legislation grew, employer resistance assumed increasingly discrete forms. For the most part, the business community remained united in its opposition to the legislation throughout the period in question; what changed, Lehrer contends, were the tactics used in contesting it. (pp. 203, 217, 223)

By contrast, Lehrer argues, the stance of organized labor was more ambiguous. Firmly committed to organization rather than legislation as a means of self-help, the male-dominated craft unions of the American Federation of Labor (AFL) slowly came to support protective legislation as appropriate for women, drawing the line at minimum wage laws. (pp. 144-45, 148-53) But where the AFL's national leadership offered only tentative support of protective legislation during the pre-war period, Lehrer suggests that member unions may have been far more actively involved in promoting regulation at the local level: she documents the role of the Iron Molders Union in obtaining New York legislation that excluded women from the core room of foundries. (pp. 157-59) Organized labor became more visibly interested in the regulation of women's employment only as the approach of World War I raised the prospect of

---

<sup>15</sup> The National Consumers League lobbied for protective legislation, and organized consumer boycotts as a strategy to improve the working conditions of women and children. Erickson, *Historical Background of "Protective" Labor Legislation: Muller v. Oregon*, in 2 WOMEN AND AMERICAN LAW: THE SOCIAL HISTORICAL PERSPECTIVE 155, 158 (D. Weisberg ed. 1982).

large numbers of women entering men's traditional jobs. (p. 151) At this juncture, even the executive council of the AFL was moved to embrace principles of equal pay—and to espouse concern that women not perform tasks for which they were unsuited. (pp. 155-56)

If wartime upheaval in domestic labor markets prompted the AFL to adopt a more favorable view of protective legislation, so, too, Lehrer argues, did wartime experience transform at least some middle-class advocates of the legislation into critics. After passage of the nineteenth amendment, the militant suffragists of the National Women's Party (NWP) cautiously began to voice criticism of the legislation—provoked in part, Lehrer suggests, by the wholesale firing of women transit workers at the war's end, an action which employers blamed on night-work restrictions. What, these suffragists asked, was the effect of protective legislation on women who had succeeded in entering men's jobs during the war? (pp. 106-07) Open controversy broke out in the ranks of the suffrage movement when in 1923 the NWP backed an equal rights amendment, whose terms were understood to compromise protective legislation for women. At this juncture, the NWP announced its opposition in principle to all sex-based distinctions in law and denounced the central premise on which the regulatory regime rested: that women's peculiar weakness justified special protection. (pp. 108-09) With equal ferocity, the NWP attacked the legislation as contrary to women's class interests, insisting that men, not women, were the primary beneficiaries of its protection. (pp. 111-13)

By contrast, Lehrer observes, the majority of those who fought for suffrage remained adamant in their support for the legislation. Faced with evidence of the legislation's exclusionary workings in the post-war period, the League of Women Voters<sup>16</sup> and WTUL contended that the legislation benefited the majority of working women, who remained unorganized and burdened with family responsibilities. They derided NWP's preoccupation with equal access as mere professional ambition, neither pertinent to the life circumstances of most working women, nor implicated by the regulations in issue. Indeed, they now embraced family life as women's social and biological destiny. (pp. 102-05, 127-28) Where for decades WTUL had proudly defended women's right and capacity to enter all fields of employment, by the 1920s the organization had despaired of organizing women without AFL assistance and turned to legislation as the primary means to secure workplace protection for a weaker sex. (pp. 123-28) As Lehrer documents, WTUL's efforts were vigorously opposed by a small group of women workers, most of them printers, who formed the Equal Opportunity League to protest legislative restrictions on women's employment (pp. 128-32, 162-68); however, she

<sup>16</sup> The League of Women Voters served as organizational successor to the National American Woman Suffrage Association (NAWSA) after passage of the nineteenth amendment. (p. 99)

identifies no other organized source of opposition to protective legislation within the ranks of working-class women. To the contrary, Lehrer notes, WTUL enjoyed the support of the International Ladies Garment Workers' Union, and apparently was capable of drawing crowds of women workers to public hearings in support of the legislation. (pp. 177-81)

Having analyzed the loci of support and opposition to protective legislation over a span of several decades, Lehrer is not, however, ready to answer the question of whose interests it served. Indeed, she flatly rejects the neat equation of advocacy and interest a "pluralist" model of political process might offer, seeking instead an answer in the systemic logic of the protective regime itself. (pp. 12-13) The legislation, she observes, did more than stereotype or discriminate against women: "Protective labor legislation for women served to legitimate and reinforce . . . the chief role of women as unpaid workers in the home, while also 'adjusting' their work force participation to prevent it from impinging upon their primary function in capitalist society." (p. 229) From a functional standpoint, then, the legislation worked to "preserv[e] the basis for capitalist production." (p. 229) It is from this functional assessment of the legislation that Lehrer derives a dynamic account of its historical logic:

These laws developed as an attempt to mediate the contradiction under capitalism, between the need to reproduce the labor force (which takes place within the family and is based on the domestic labor of the wife outside the labor force) and the desire of capital to use women's labor to the limits of human endurance as cheap, relatively unskilled wage labor (since the wage structure of women was based on the assumption that women are not the primary breadwinner in a family). Capital both depended upon the family for the maintenance and reproduction of its labor force and also, in its exploitation of women workers in particular, tended to destroy it. This is the significance of the social reformers' pleas for the "preservation of the family," despite their quaint, moralistic tone. (pp. 227-28)

Lehrer's summary thesis, advanced in the concluding pages of the book, retrospectively infuses the debate examined in the body of her work with unsettling import. The history of advocacy there documented now appears epiphenomenal, its "significance" to be explained by recourse to the deep structure of capitalism, whose "need[s]" and "contradiction[s]" account for enactment of protective legislation. This interpretive strategy demands scrutiny, if only because it dramatically inverts relations of advocacy and interest. Testing the coherence of Lehrer's argument, internally and against her evidence, not only reveals troubling deficiencies; it renders suspect any schematic formulation of the legislation's political logic.

## II.

At the outset, it can be observed, several aspects of Lehrer's methodology compromise the strength of her interpretive claims. Whatever its political complexion, a functional analysis of a particular social institution cannot adequately account for the processes of its development. Yet, it is from such a functionalist assessment of protective legislation that Lehrer would derive a dynamic model of its life. In essence, Lehrer is blinded by "the wisdom of hindsight." (p. 15) While purporting to analyze the "origins" of protective legislation, her argument remains focused on the form and function it ultimately assumed, conflating questions of cause and effect. In this overdetermined account of historical process, the "interests" protective legislation came to serve play a more prominent role in explaining its enactment than the actions, intentions, and expectations of historical actors.

The problem is further compounded by the model of historical process on which Lehrer relies. Quite plainly, any inquiry into the origins and effects of protective labor legislation for women must explore concerns of gender not readily amenable to class-based analysis. Yet, Lehrer never critically analyzes a class-based model of historical process in light of its inattention to matters of gender. Rather she compensates for its explanatory deficiencies by "borrowing" from feminism, combining class- and gender-based accounts of historical process without undertaking to reconcile them.<sup>17</sup> Where tensions between them become acute, Lehrer's allegiance to class-based paradigms prevails, inclining her to discount the gendered character of the relations of advocacy and interest she seeks to explain.

To sustain her argument that protective legislation developed in the interests of the employers who most opposed it, Lehrer must explain how, as a matter of history, this transpired. The agent of this paradoxical turn of events, Lehrer argues, was the state: "The state acts to preserve the long-run interests of capitalists, even though it may run counter to their immediate demands. . . . do[ing] for capitalists what they are unable to do for themselves individually." (pp. 15, 225) Yet Lehrer scarcely examines enactment of protective legislation from the vantage of

---

<sup>17</sup> Where categories of class do not suffice to explain the character of social relations under capitalism, Lehrer invokes categories of gender. However, she makes little effort to integrate the two systems of explanation. Thus, to account for the sexual organization of economic relations, Lehrer argues that capitalism built upon elements of a patriarchal social order antecedent to it (p. 230); at scarcely any point, however, does she modify the concept of "interest" to take cognizance of gender as well as class. Having proceeded throughout on the assumption "that the state is a *capitalist* state" (p. 15), Lehrer abruptly concedes, three pages prior to the close of the book, that it is "also . . . 'patriarchal.'" (p. 236) If Lehrer means to argue that the gendered forms of social relations are merely artifacts of a prior patriarchal tradition now wholly integrated into capitalism, this last concession is inexplicable. For if the state is "also . . . 'patriarchal,'" gender relations have present social force within capitalism for which Lehrer must account.



state processes. Indeed, she identifies no active proponents of the legislation who sought reform in the interest of the business classes.<sup>18</sup> Instead, the primary legislative advocates she does identify are a group of social reformers who saw themselves as acting on behalf of working women. If their advocacy does not supply the evidence of intention her argument requires, Lehrer is content to emphasize its premises and effects. Recognizing that proponents of legislation, both of the middle and working class, sought to aid wage-earning women and in fact succeeded in "ameliorating some of the worst abuses of their working situation," (p. 228) Lehrer observes that none, including WTUL, questioned the primacy of women's family obligations, and therefore charges all with having worked to reinforce women's secondary position in the market. (pp. 93, 139)

Having classed the majority of women as unwitting allies of capital, Lehrer uneasily hedges the role of organized labor. (pp. 9-10, 236)<sup>19</sup> Though she firmly judges the legislation to have operated in the interests of capital, she does concede that it was "also in the interests of male labor, at least as they saw it." (p. 236) Craft unions of the period tended to adopt a "male-supremacist outlook": to wit, "male unionists and employers put aside their differences and united over the need to 'protect' women out of skilled trades," thereby protecting men's jobs and preserving women's domestic role. (p. 232) As she obliquely concedes, the unions "showed little sense of class unity." (p. 232) But, if employers and unionists came to see common benefit in a sex-based legislative regime that could be used to secure women's familial and market status, nothing in Lehrer's account suggests they grasped this possibility at the outset. Analyzed from a contemporary rather than retrospective vantage, and situated in a world organized by gender as well as class, women's advocacy of protective legislation may have had other significance, and even more sense, than Lehrer grants it.

---

<sup>18</sup> Lehrer never points to any significant group of employers promoting the legislation in their own interests. She does allude to "*some* employers [who] conceded that legislation . . . might work to their benefit." (p. 234) It remains unclear whether even these employers ("evidently a small minority") acted to secure passage of the laws, were effective in this capacity, or merely intended their concessions for public consumption. (pp. 234-35)

<sup>19</sup> Lehrer is quite explicit in stating the basis of her reservations:

Although male unionists often did their best to reinforce the subordinate position of women in the labor force through outright exclusion and "protective" legislation, and defined women primarily in terms of their role in the family as wives and mothers, male workers did not create the conditions under which women worked—that is, wage labor. It is simplistic to blame the male worker for the oppression of women . . . even though he was often a willing participant in that oppression. (pp. 9-10)

This analysis begs the complicity of male unionists in the specific forms of women's "oppression" with which Lehrer is otherwise concerned: that is, women's *unwaged* and *underwaged* labor. Other historians of protective labor legislation have accorded organized labor a considerably greater role in promoting restrictive legislation. See, e.g., A. KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN* 201-05 (1982); Shanley, *supra* note 8, at 70-71.

Lehrer's argument that protective legislation was enacted in the interests of capital is pitched at the highest level of abstraction, and does not square with the record of advocacy she has meticulously compiled.<sup>20</sup> This tension between her argument and her evidence is most disconcerting in its narrative effects. For the story that emerges from *Origins of Protective Labor Legislation for Women* little resembles the familiar struggle of capital and labor. What emerges instead is a struggle of women against women, in which women serve as the primary agents of their own victimization—feminist advocates and opponents of protective legislation standing as proxies for the interests of capital and labor properly understood. While the struggle amongst women over protective legislation is critical to any account of this historical episode, and Lehrer has gathered much documentary evidence that can contribute to our understanding of it, the narrative and critical frame in which she presents it is fundamentally flawed.

Throughout her account Lehrer styles advocates of the legislation as "social reformers" (pp. 93, 95, 115, 228), while reserving the characterization "feminist" for the NWP alone. (pp. 75, 95, 139, 239) This persistent scheme of characterization artificially divides the women's movement, ignoring the fact that those who would fight over the legislation during the 1920s together fought for suffrage in the decades prior;<sup>21</sup> indeed they did so on the unquestioned premise that such legislation was a benefit the vote itself might secure. (p. 239)<sup>22</sup> Broad-based support for

<sup>20</sup> If Lehrer's evidence does not support the claim that protective legislation was enacted in the interests of capital, neither does it support a distinct claim she might advance—namely, that the legislation ultimately came to serve the interests of capital. Advancing such a claim would require a different *type* of evidence than she has supplied. Rather than analyze the attitudes of historical actors towards the legislation, she would have to analyze the actual implementation of the legislative regime. This she barely does, a lapse all the more noteworthy in light of the prominent role effects play in her argument as to causation.

<sup>21</sup> For analysis of the controversy over protective legislation as a dispute within post-suffrage feminism, see, e.g., O. BANKS, *FACES OF FEMINISM* 153-79 (1981); S. BECKER, *THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS* 197-234 (1981); N. COTT, *supra* note 8, at 117-42; N. DYE, *AS EQUALS AND AS SISTERS: FEMINISM, THE LABOR MOVEMENT, AND THE WOMEN'S TRADE UNION LEAGUE OF NEW YORK* 155-61 (1980); A. KESSLER-HARRIS, *supra* note 19, at 205-11; W. O'NEILL, *EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA* 264-94 (1969). Lehrer, however, is not alone in depicting the controversy in terms that pit "social reformers" against "feminists." See Erickson, *supra* note 15; cf. S. ROTHMAN, *WOMAN'S PROPER PLACE: A HISTORY OF CHANGING IDEALS AND PRACTICES, 1870 TO THE PRESENT* 153-65 (1978).

<sup>22</sup> Historians of feminism dispute the political significance of legislative advocacy within the suffrage movement. Some characterize suffragists' demand for protective legislation as reflecting a turn from justice-based to expedient or ends-oriented arguments for the vote, and more deeply, a turn from a natural rights tradition of feminism to one aligned with the cult of domesticity. E.g., B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 39-41 (1975) [hereinafter BABCOCK]; A. KRADITOR, *IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920* at 43-74 (1965); S. ROTHMAN, *supra* note 21, at 127-32; *Feminist Discourse, Moral Values, and the Law—A Conversation*, *supra* note 6, at 64-68 (remarks of Ellen DuBois). From this perspective, advocacy of protective legislation represents a dilution of, or departure from, feminist principles incident to broadening the basis and appeal of the suffrage movement. *Id.* However, from another standpoint, the suffrage movement was limited by its predominantly middle-class membership

protective legislation expressed a grasp, however imperfect, of commonalities in economic and familial circumstances uniting women across class lines. At the same time, it concealed substantial differences as to how women's class interests might best be advanced: for some, legislative advocacy was a strategy of self-help whose object was to strengthen woman's position in the market while for others its object was to improve woman's position in the home.<sup>23</sup>

Manifestly, a strategy of class empowerment that both challenged traditional roles and demanded enhanced valuation of them could elicit broad-based support, but not sustain it. Thus, the bitter controversy that erupted over protective legislation after passage of the nineteenth amendment can be seen as one in which the meaning and future direction of post-suffrage feminism was in issue.<sup>24</sup> By characterizing this controversy as feminist on one side only, Lehrer not only fails to explore the dilemmas of feminist advocacy as women have historically experienced them;

---

and preoccupations. From this perspective, suffragists' advocacy of protective legislation appears less a fall from feminist principles, than part of an effort to articulate a feminist agenda that transcended women's class differences. *E.g.*, M. TAX, *THE RISING OF THE WOMEN: FEMINIST SOLIDARITY AND CLASS CONFLICT, 1880-1917* at 164-201 (1980); Jacoby, *The Women's Trade Union League and American Feminism*, in *CLASS, SEX, AND THE WOMAN WORKER* 203 (M. Cantor & B. Laurie eds. 1977); Olsen, *supra* note 6, at 1534. Of course, adopting the latter perspective does not dictate a position on the wisdom or viability of the legislative strategy. Compare N. DYE, *supra* note 21, at 159-61 with M. TAX, *supra*, at 200-01.

<sup>23</sup> For some, the legislative agenda was consistent with and complementary to the object of organizing women workers; others sought redress of women's exploitation in the workplace primarily because such exploitation imperiled women's family role. Middle-class women might advocate protective legislation as an issue of economic empowerment in which they could make common cause with working-class women. Or they might see the familial dilemmas of wage-earning women as an issue whose redress required their own empowerment in the public sphere (hence justifying, not only suffrage, but the new social science professions in which they were engaged). Historians have explored the political motives driving the legislative strategy from these and similar perspectives. *See, e.g.*, N. COTT, *supra* note 8, at 117-20; N. DYE, *supra* note 21, at 151-53; S. ROTHMAN, *supra* note 21, at 114, 119-32; Jacoby, *supra* note 22, at 207-15.

<sup>24</sup> While disputes over advocacy tactics dating from the suffrage campaign found expression in the conflict over protective legislation, they in no simple sense produced it. *See* N. COTT, *supra* note 8, at 122; W. O'NEILL, *supra* note 21, at 274-78, 283-92; *cf.* S. BECKER, *supra* note 21, at 199-200, 204. The more "militant" suffragists of the NWP contained within their ranks former supporters of WTUL and protective legislation. *See* N. COTT, *supra* note 8, at 120-22; S. BECKER, *supra* note 21, at 199; N. DYE, *supra* note 21, at 156-57. Some who had been active in the NWP, notably Florence Kelley, remained fiercely committed to the legislation in the 1920s. N. COTT, *supra* note 8, at 122-24; W. O'NEILL, *supra* note 21, at 275-76. Fundamentally, the conflict divided the suffrage movement as it exposed tensions within woman's rights advocacy not confronted in the pre-suffrage era. *Cf.* N. COTT, *supra* note 8, at 119-20.

Evaluating the significance of this conflict for post-suffrage feminism entails more than a judgment about the practical merits of the legislative strategy. At issue is a judgment about the nature of the feminist coalition conflict splintered: did suffragists' support for women's hours and wage legislation reflect compromise or enrichment of feminist advocacy? *See supra* note 22. Lehrer never engages this historiographical controversy. Nor does she even justify her characterization of contestants in the debate over protective legislation in self-conscious terms. Compare BABCOCK, *supra* note 22, at 40 ("Fundamentally . . . [female social reformers] were not feminists; their first and primary concern had never been an effort to change women's position in society vis-à-vis men, and they had joined the suffrage movement not because of the essential justice of granting women the vote, but because they believed that the women's vote would help them enact the social reforms which were their essential concern.").

she declines to recognize a host of concerns and strategies *as* feminist.<sup>25</sup> If this bias accounts for Lehrer's rather self-contradictory embrace of the middle-class NWP over the cross-class alliance represented by WTUL (p. 239),<sup>26</sup> it explains as well her notable lack of curiosity about the viability of the strategy proponents of the legislation adopted.

In the years before and after the turn of the century when protective legislation for women was first enacted, women were systematically excluded from male craft unions, occupationally segregated, and consistently paid at rates well below men.<sup>27</sup> Abundant evidence to this effect is scattered throughout Lehrer's narrative, although obscured by her focus on the politics of scientific management as an economic context for the legislative initiative. In the face of this evidence, one might well conclude—as prior to the 1920s most women apparently did—that properly designed legislation could improve women's working lot. In occupations dominated by women working at substantially depressed wage rates, legislation limiting hours might well have provided relief without sexually exclusionary effect;<sup>28</sup> however regulated, women's labor was likely to be cheaper than men's.<sup>29</sup> Similarly, minimum wage legislation posed little threat to women's jobs where their wages, unregulated and regulated,

<sup>25</sup> Precisely because Lehrer employs the term "feminist" without exploring the implicit historiographical and philosophical assumptions of her usage, she narrates the controversy in terms that obscure some of its more fascinating dimensions. What are the possibilities of forging a cross-class alliance among women, and what are the attendant dilemmas? How can or must feminism respond to differences in women's interests and circumstances—and to differing perceptions among women of their common interests? Does a commitment to comparative equality alone define feminist vision? If not, what other values might inform a feminist conception of equality? How might its pursuit conflict with feminist commitment to women's welfare, or their culture? Finally, to what philosophical, political, and historiographical tensions within feminism do these questions give rise? Lehrer's failure to engage such questions is especially noteworthy in light of her historical and political interest in questions of class as well as gender.

<sup>26</sup> Lehrer places primary responsibility for exclusions under the legislation on the backs of its proponents in the WTUL, in effect embracing NWP as a proxy for the interests of working-class women properly understood. From an historical standpoint, she thus vilifies those women most interested in synthesizing gender and class advocacy, displaying little sympathy for the difficulties they encountered in pursuit of this goal—within the labor movement, the suffrage movement, or even among the working-class women whose cause they sought to advance.

<sup>27</sup> See N. COTT, *supra* note 8, at 129-34; A. KESSLER-HARRIS, *supra* note 19, at 151-71 (unionization); J. MATTHAEI, *AN ECONOMIC HISTORY OF WOMEN IN AMERICA: WOMEN'S WORK, THE SEXUAL DIVISION OF LABOR, AND THE DEVELOPMENT OF CAPITALISM* 187-232 (1982) (sexual stratification of the workforce); L. TENTLER, *WAGE-EARNING WOMEN: INDUSTRIAL WORK AND FAMILY LIFE IN THE UNITED STATES, 1900-1930* at 13-25, 169-72 (1979) (wages).

<sup>28</sup> In this discussion I consider only those exclusionary effects specific to sex-based protective legislation. Of course, both sex-based and sex-neutral hours and wage laws may, by increasing the cost of labor to the employer, result in a net job loss to the working class; to the extent such legislation sets industry standards, it may impede gains through bargaining; and finally, collective standards may inhibit individual workers from pursuing what they conceive to be their best interests in the market. These liabilities are common to all forms of protective labor legislation, whose strategic wisdom I do not understand Lehrer to question.

<sup>29</sup> This argument was in fact presented to the *Muller* Court by Brandeis and Goldmark. Brief for Defendant in Error at 82-84, *Muller v. Oregon*, 208 U.S. 412 (1908).

remained at levels below men's. While Lehrer emphasizes the defeat of minimum wage legislation in *Adkins v. Children's Hospital*,<sup>30</sup> proponents of the legislation were in fact successful in enacting and defending wage laws for women in a good number of states by the mid-1920s.<sup>31</sup>

Of course, night-work laws and occupational restrictions, where enforced, had immediate exclusionary impact. Moreover, as feminist critics of the legislation recognized in the post-war period, even regulation not explicitly exclusionary in form might acquire exclusionary effect where applied to women in partially integrated work settings. But while feminist critics came to condemn sex-specific legislation as exclusionary per se, the historian requires some factual basis for evaluating this judgment. If we are to assess the actual impact of protective legislation, and further, to determine what responsibility its feminist proponents might bear for its exclusionary effects, a complex array of questions arises. What was the actual coverage of the maximum hours and minimum wage legislation, when first enacted and in later decades? How prevalent were night-work laws, and sex-specific occupational exclusions; when did they appear, in what industries, and at whose urging? What was the extent of women's occupational segregation over this period? What forms of regulation exacerbated it; when did they do so, and how? What were the politics of enforcement? Did the legislation cause or excuse sex-based exclusions? What were its countervailing effects? How did women fare in comparable, but unregulated, occupational circumstances?<sup>32</sup>

Unfortunately, Lehrer, who is interested in the politics of regulation only at the most abstract level, never inquires into such prosaic matters. She offers no account of the actual workings of the legislation across states or over time, thereby preventing evaluation of the strengths and

<sup>30</sup> 261 U.S. 525 (1923).

<sup>31</sup> By the mid-'20s, minimum wage laws had been enacted in Arizona, Arkansas, California, Colorado, the District of Columbia, Kansas, Massachusetts, Minnesota, North Dakota, Oregon, Puerto Rico, Texas (repealed), Utah, Washington, and Wisconsin. Compulsory minimum wage legislation had been upheld by courts in Arkansas, Minnesota, Oregon, Texas, and Washington. *THE SUPREME COURT AND MINIMUM WAGE LEGISLATION* at ix-x, 5 (National Consumers League ed. 1925); ELIZABETH FAULKNER BAKER, *PROTECTIVE LABOR LEGISLATION 79-84* (1925), reprinted in 116 *STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW* (Faculty of Political Science of Columbia University ed. 1925). In fact, a decision of the Oregon Supreme Court upholding the state's minimum wage laws was appealed to the U.S. Supreme Court, where it was affirmed by an equally divided court. *Stettler v. O'Hara*, 69 Or. 519, 139 P. 743 (1914), *aff'd*, 243 U.S. 629 (1917). This decision was generally construed as legalizing wage regulation, as Justice Brandeis, who worked on the state's brief, did not participate in the decision. J. BAER, *supra* note 2, at 92; *THE SUPREME COURT AND MINIMUM WAGE LEGISLATION*, *supra*, at 3. The *Adkins* case was thus the first setback for minimum wage regulation.

<sup>32</sup> For one example of such analysis, see A. KESSLER-HARRIS, *supra* note 19, at 180-214. For a general examination of women's wartime employment, see M. GREENWALD, *WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES* (1980). While Lehrer focuses on the notorious role night-work restrictions played in the firing of New York transit workers (p. 106), it should be noted that women transit workers in cities without such legislation were similarly excluded; indeed, WTUL played a key role in defending their jobs. (pp. 132-33) See M. GREENWALD, *supra*, at 139-84.

weaknesses of the legislative agenda social reformers advocated. Nor does she attempt to discriminate among social reformers, legislators, employers, and organized labor in allocating responsibility for the legislation's exclusionary effects. Thus, she never entertains the possibility that women pursued a strategy that was flawed in part, or one that became dysfunctional over time, much less the possibility that, with time, business and labor might have learned to exploit that strategy to their own ends. Instead, working from the vantage of "hindsight," Lehrer projects the ultimate logic of the regulatory regime back in time, attributing to "the state" a foresighted grasp of the long-run interests of capital, and to those who attempted to use it a blind complicity. If feminist proponents of protective legislation did not question the primacy of women's family role and ultimately came fiercely to defend it, they were passionately committed to redress of the real conflicts with which wage-earning women daily contended. Both values informed their advocacy. For this reason, if no other, the legislative strategy they pursued deserves more respectful inquiry than Lehrer has accorded it.<sup>33</sup>

Judged from a legal and political standpoint, there were, of course, distinct risks to the sex-specific strategy legislative proponents pursued, and considerable harm to women did in fact result. Indeed, Lehrer, who emphasizes the larger political dynamic of protective legislation, tends to underestimate its specifically legal lineage and legacy. Where state legislatures had only recently conferred upon wives capacity to contract and rights in earnings contrary to common law rules, courts' readiness to exempt women from doctrines of free contract reflected something more than "the prevailing custom and culture of the time." (p. 61) The common law itself viewed women's contracts in terms of their familial relations, a tradition courts now perpetuated in constitutional terms.<sup>34</sup> From a legal standpoint, then, NWP's contract-based objections to the legislation seem less conservative than Lehrer suggests (pp. 112, 164), and its apprehensions about the wisdom of a sex-based legislative strategy more acute than even she grants. While Lehrer repeatedly observes that judicial ratification of labor protective legislation was not strictly sex-specific

<sup>33</sup> Compare, e.g., N. COTT, *supra* note 8, at 134-42; Basch, *supra* note 8, at 113-15; Olsen, *supra* note 6, at 1534-41; Krieger & Cooney, *supra* note 6, at 570-72.

<sup>34</sup> Courts asked to rule upon the constitutionality of protective legislation for women adverted to the contractual disabilities of wives at common law with frequency, often referring to such disabilities as a matter of sexual rather than marital status. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923); *Muller v. Oregon*, 208 U.S. 412, 418, 422 (1908); *Ritchie v. Wayman*, 244 Ill. 509, 518, 91 N.E. 695, 696 (1910); *Ritchie v. People*, 155 Ill. 98, 113, 40 N.E. 454, 458 (1895) (striking down legislation); *Wenham v. State*, 65 Neb. 395, 405, 91 N.W. 421, 424-25 (1902); *People v. Williams*, 189 N.Y. 131, 136-37, 81 N.E. 778, 780 (1907) (striking down legislation); *State v. Muller*, 48 Or. 252, 257, 85 P. 855, 857 (1906), *aff'd*, 208 U.S. 412 (1908). Cf. *State v. Loomis*, 115 Mo. 307, 313, 22 S.W. 350, 351 (1893) (voiding act prescribing lawful means of wage payment) ("classification is reasonable and not arbitrary" where it "concern[s] married women, minors, insane persons, bankers, common carriers and the like . . ."). I examine the relation of common law and constitutional traditions in a forthcoming article on reform of marital status law.

(pp. 56, 238), she ignores the fact that *Muller v. Oregon*<sup>35</sup> inaugurated a constitutional regime of longevity and consequence exceeding even the substantive due process principles of *Lochner v. New York*.<sup>36</sup> In a constitutional tradition devoid of any competing conception of women's citizenship, *Muller's* logic proved sufficient to justify any sex-based form of state action, and in fact did so unchecked until 1971.<sup>37</sup> Early feminist critics of protective legislation thus proved farsighted in both their legal and political critique of the regime, and, as Lehrer abundantly documents, turned a wickedly modern wit to the task of deconstructing its pronatalist logic. (pp. 108-11)

Whether we are to embrace their feminism as our own, as Lehrer at times seems to suggest (pp. 6, 239), presents yet another question. We can and should debate the prescriptive agenda of the NWP, asking whether—on grounds of principle, pragmatism, politics, and prudence—a commitment to formal equality would have proved more effective in redressing conditions of material inequality in their time, or might be so in our own. But if we are to seek guidance in history, it will not do to conflate such questions. *Origins of Protective Labor Legislation for Women* presents its story as if readily assimilable to current debate (p. 6), whereas the task of making sense of each moment in history seems a far more complex one, requiring us to draw and debate discriminations, as well as continuities and parallels.

Rather than equate the protective episode with the evils of any departure from the principles of formal equality, we need to define its historical import with more precision. Was the legislative strategy a counterproductive one from the outset? In all its parts? What exactly was its role in exacerbating women's occupational segregation? By what criteria are we to evaluate its benefits and detriments to women as a

<sup>35</sup> 208 U.S. 412 (1908).

<sup>36</sup> 198 U.S. 45 (1905).

<sup>37</sup> *Reed v. Reed*, 404 U.S. 71 (1971), was the Supreme Court's first decision holding sex-based classifications violative of the equal protection clause. For an analysis of *Muller's* constitutional significance in preceding years, see J. BAER, *supra* note 2, at 107-24; Rhode, *Justice, Gender, and the Justices*, in *WOMEN, THE COURTS, AND EQUALITY* 13, 16-18 (L. Crites & W. Hepperle eds. 1987). The expansive logic of the opinion was readily grasped by courts of the era—as, for example, in this opinion by Judge Learned Hand for the Illinois Supreme Court, issued just two years after *Muller*:

We have already pointed out that the physical structure and maternal functions of women place them at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes, a difference which, in our judgment, is of such a substantial character as to form a basis for legislation without making the legislation subject to the objection that it was not a proper exercise of the police power. The differences existing between the sexes has [sic] often formed the basis of classification upon which to found legislation. It is this distinction, when used as a basis for legislation, which authorizes legislation exempting women from military and jury service and from working upon the public highways or working in mines, and which permits men to enjoy, alone, the elective franchise and to hold public office, and fixes their status as the head of the family in exemption and homestead laws.

*Ritchie v. Wayman*, 244 Ill. at 523, 91 N.E. at 698 (upholding legislation fixing women's employment at a maximum of ten hours a day).

class? The debate over such questions is only a prelude to another. What differences in women's economic, legal, and political circumstances distinguish this moment from our own? In what respects do legislative and adjudicative strategies presently contemplated differ from those adopted by women at the turn of the century? Finally, to what extent are such differences negated by the risk of "capture"—the possibility that the logic of a particular strategy may be subject to legal or political distortion? Debate of such matters should prove far more instructive than any ready application of history's lessons.

*Origins of Protective Labor Legislation for Women* both advances and impedes this project. Lehrer's ambitious analysis of advocacy and interest clearly raises the stakes in grappling with this episode. At the same time Lehrer obscures an aspect of the legislation's legacy that must be reckoned with by any who would analyze its historical or contemporary significance: the polarizing effects of dispute over protective legislation on feminism itself.

Debate over sex-specific legislation during the 1920s did not sort out social reformers and feminists, so much as it drove those debating the meaning of feminism to simplify its complex impulses in ways that ultimately muted their transformative power. In retrospect, we can distinguish advocates and opponents of regulation rhetorically, by their proclivity to speak the language of difference or similarity, and tactically, by their advocacy of sex-specific or formal strategies. In so doing, however, we merely reproduce polarities the debate itself engendered, obscuring the dilemmas of advocacy from which it issued.<sup>38</sup> Drawing on diverse strands of a common, complex heritage, opponents of the legislation denounced sex-based regulation as an encumbrance on women's potential lives, while proponents defended it as demanded by the circumstances of women's actual lives. Both values must inform any politics of transformative aspiration, despite tensions to which they invariably give

---

<sup>38</sup> To draw a contemporary parallel, those debating the maternity leave question are often figured as "equal treatment" and "special treatment" feminists. The characterization has elicited protests from commentators on all sides of the question, who view it as oversimplifying their respective positions. See, e.g., Olsen, *supra* note 6, at 1518 n.2; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 365 n.152, 380 n.224 (1985). Not only do these objections reveal commonalities of concern; they suggest the controversy is as much a dispute over tactics, as principle or philosophical commitment. Indeed, some have explicitly acknowledged as much. See Kay, *supra* note 3, at 34.

In significant contrast to the circumstances of feminist debate in the 1920s, the present dispute has not precluded critical dialogue among those in contention. See Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-13 (1984); Kay, *supra* note 3, at 32-37; Olsen, *supra* note 6, at 1540-41; Taub & Williams, *supra* note 5. From this vantage, controversy would appear to have vitalized feminist advocacy; it most threatens to undermine it where conducted on the premise that a single contested issue can adequately "test" feminist impulses, or a single position definitively comprehend them. If this observation has merit, it would seem to bear equally on matters of historiography as well as contemporary politics and jurisprudence.



rise. Our object should be to recover the sympathies and circumstances driving each of these voices within the tradition—without recapitulating, in matters of history or politics, the conflicts that split them asunder.

# Book Review

**WOMEN'S WORK & CHICANO FAMILIES: CANNERY WORKERS OF THE SANTA CLARA VALLEY** By Patricia Zavella. Ithaca: Cornell University Press, 1987. Pp. xviii, 191. \$35.00 cloth; \$10.95 paper.

**Reviewed by Maria Blanco†**

Patricia Zavella's first book, *Women's Work & Chicano Families*, provides an insightful and thought-provoking look at a topic that continues to hold great interest for feminists—women, work and the family. Zavella revisits this subject with a long overdue study of Chicanas' participation in the labor force and the Chicano family. The book focuses on seasonal Chicana workers in the Santa Clara Valley canning industry and analyzes the complex linkages between seasonal work, gender segregation in the workplace, and patriarchal family relations. Using an historic and ethnographic approach, Zavella discusses the reasons why Chicanas entered the seasonal canning labor force, conditions in the canneries, and the impact of women's employment on families.

*Women's Work & Chicano Families* compresses volumes of feminist scholarship and polemics on the causes of women's inferior position in the labor market (sex-role socialization theory, analysis of who benefits from women's labor, and patriarchal family ideology, to name only three schools of thought). Zavella adopts socialist feminist analysis which looks to the labor market for an explanation of why women are concentrated in particular occupations or industries—in this case canning. Accordingly, she takes exception to the school of thought that posits cultural values as the sole determinant of Chicanas' labor force participation.<sup>1</sup> She argues strongly, however, that an accurate account of the lives of Chicana workers must incorporate race and cultural considerations into socialist feminist theory. For Zavella this means understanding both the role racism plays in employment opportunities, and the existence of a family ideology specific to Chicanos. (pp. 5-6, 170)<sup>2</sup> Zavella's study

---

† Staff Attorney, Equal Rights Advocates, San Francisco, California. A.B. 1981, University of California, Berkeley; J.D. 1984, University of California, Berkeley.

<sup>1</sup> See P. ZAVELLA, *WOMEN'S WORK & CHICANO FAMILIES: CANNERY WORKERS OF THE SANTA CLARA VALLEY* 11 (1987) for reference to studies employing this theory.

<sup>2</sup> All parenthetical page references are to P. ZAVELLA, *supra* note 1.

incorporates social history and detailed, in-depth interviews to illustrate her point.

The interviews reveal that Zavella's informants decided to enter the seasonal cannery labor force due to a combination of two factors. First, the local job market was such that for women with a limited education and English-speaking ability, seasonal cannery work was the best option. (pp. 90, 98) Second, seasonal employment was in a sense a compromise because, despite a family's need for additional income, the woman's decision to work was often controversial. Many husbands resisted the idea, and women were concerned that work would interfere with their obligations as mothers and homemakers. They viewed seasonal work four or five months out of the year as temporary, permitting traditional family roles to remain in place. (pp. 98, 137-148)

While seasonal employment alleviated tension and conflict at home, it contributed to the segregation of Chicanas into oppressive and stressful jobs. (pp. 71, 168) As seasonal workers, the women did not have sufficient clout with the employers or the local Teamsters' union to insist on decent working conditions. (p. 70) Zavella vividly describes the hazardous and oppressive conditions of the cannery cookrooms and lines. (pp. 107-110)<sup>3</sup> Furthermore, seasonal employment meant that women started and remained in low-paying, dead-end jobs. Women who had worked over ten seasons in a cannery returned to the same bottom-rung job year after year. This situation originated with the industry's practice of dividing work into men's and women's work. (pp. 30, 32, 69) It was institutionalized by a union that, for years, negotiated contracts with separate seniority lists for seasonal workers and year-round workers (mainly white men in non-assembly line jobs). (pp. 54-62) The existence of two lists made it virtually impossible for seasonal workers to get hired in full-time jobs. (pp. 54-55)

Even after the seniority lists were finally merged in 1973, white men dominated the high-paying jobs through two mechanisms. First, the mostly white male year-round workers were grandfathered into the top of the merged list. Second, the canneries used an informal "incumbency rule." Under this rule, workers who spent more than half of their time in high-paying seasonal jobs had first choice in retaining those jobs the following season, regardless of seniority. White males were often hired temporarily for high-paying positions and then became incumbents in those positions which led to full-time jobs. (pp. 55-56) As a result of these practices the canneries contained two distinct labor forces. Men, espe-

---

<sup>3</sup> In 1976 the food and kindred-products industry had the second highest rate of work-related injuries in California, after the lumber-manufacturing industry. P. ZAVELLA, *supra* note 1, at 108 (citing DEPARTMENT OF INDUSTRIAL RELATIONS, OCCUPATIONAL INJURIES AND ILLNESSES SURVEY, CALIFORNIA, 1976 at 7 (State of California, Division of Labor Statistics and Research 1978).

cially white men, held the year-round, skilled or supervisory positions. Women, especially Chicanas, filled the lower-level seasonal jobs. (p. 59)

In the late 1960s, Chicano men and women (sometimes along with other workers) in San Jose, Hayward,<sup>4</sup> Modesto and Sacramento formed highly active rank and file dissident caucuses to represent them where the Teamsters' locals had not done so. (pp. 62-63) In 1973, as an outgrowth of the caucuses, male and female cannery workers, primarily Chicanos, filed a Title VII race and sex discrimination suit, *Alaniz v. California Processors, Inc.*,<sup>5</sup> to eradicate the separate work forces. (p. 64) Defendants in the case included: cannery companies throughout Northern California, unions which represent their employees, including the Teamsters' Union, and industry-wide collective bargaining agents for the companies and the unions.<sup>6</sup> The plaintiffs alleged that wages and promotions were issued in a discriminatory manner that favored white males. The court agreed, and in 1976 ordered implementation of a Conciliation Agreement which included an affirmative action plan that called for preferential hiring and training programs, and the promotion of women into 30% of the high-paying jobs, as well as the dismantling of the grandfathered seniority list, the elimination of the "incumbency rule,"<sup>7</sup> and the establishment of plant seniority based on date of hire regardless of seasonal or regular job.<sup>8</sup> (pp. 64-65)

While Zavella may be right when she argues that women contributed to their own segregation by choosing seasonal occupations (pp. 98, 168), she fails to elaborate upon a crucial change in consciousness: once employed, women organized against the segregation and fought for upward mobility in the workplace. Although some of Zavella's informants did not take advantage of the promotional opportunities that had been opened up by the litigation and organizing (pp. 120-26), women had been involved in working to make sure the options existed. Clearly they had begun to identify as workers as well as mothers and homemakers, and they ceased to see their seasonal jobs as a temporary phenomenon.

Did this egalitarian spirit take hold in the home? What effect did the women's employment have on the Chicano families interviewed in this book? Zavella concludes that although the working women had more say in family matters, including how money was spent, family roles did not undergo a fundamental transformation. The household division of labor shifted somewhat when the women were working. However, hus-

---

<sup>4</sup> The Hayward Caucus, founded by women, was originally organized by Chicanas "who had invited Black and white women to join them." (p. 63)

<sup>5</sup> 73 F.R.D. 269 (N.D. Cal. 1976).

<sup>6</sup> *Id.* at 272-73.

<sup>7</sup> *Alaniz*, 73 F.R.D. 269.

<sup>8</sup> *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289 (N.D. Cal. 1976) *aff'd on other grounds per curiam sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978), *cert. denied sub nom. Beaver v. Alaniz*, 439 U.S. 837 (1978).

bands, children and the women themselves continued to view housework as the women's responsibility. Zavella attributes the lack of fundamental transformation to rigid, segregated seasonal jobs that kept women economically dependent on their husbands. (pp. 169-170) She notes, however, that her informants who moved into higher-paying jobs were better able to effect changes at home. (p. 170) While this economic argument is attractive, discussion of some comparative studies on full-time Chicana workers and their leverage (or lack thereof) in the home would have been helpful toward an understanding of the large role ideology plays in maintaining patriarchal family norms.<sup>9</sup>

*Women's Work & Chicano Families* is instructive for activists and attorneys working to understand and eliminate the causes of occupational gender segregation in seasonal as well as nonseasonal employment. Although the cannery industry has declined dramatically since the late seventies, many Chicana women continue to work in other low-paying seasonal/cyclical jobs.<sup>10</sup> Zavella's study demonstrates that women work in these jobs because of limited job opportunities due to skills, schooling and language, as well as concern over quality childcare for their children and home responsibilities. (pp. 88-98) It reminds us that low-cost, quality childcare would go a long way in allowing more women to work outside the home in better-paying, full-time jobs with promotional opportunities. Furthermore, the battle for equality in the family is essential to the economic empowerment of women. Many women will continue to work in seasonal, marginal jobs as long as traditional patriarchal notions of family roles predominate.

In addition, Title VII litigation similar to that filed by the cannery plaintiffs<sup>11</sup> provides a strategy for changing the marginal nature of cyclical work. *Alaniz v. California Processors, Inc.*<sup>12</sup> demonstrates that courts are willing to find that differential treatment of seasonal and year-round workers can constitute sex and race discrimination. Women who return yearly to the same seasonal job should enjoy terms and conditions of employment equal to those of year-round workers, particularly with regard to seniority and promotional opportunities. They must have the option of moving into full-time employment and better-paying positions.

The *Alaniz*-type litigation described by Zavella also serves as a strategy for moving women into higher-paying *non-traditional* jobs. Some sex-discrimination lawsuits do this by opening up entire industries and workplaces that are male-dominated (e.g., skilled trades, police and fire departments). Here, the women moved into the nontraditional occupa-

<sup>9</sup> Zavella refers to other studies of Chicana workers throughout the book. However, she does not discuss any in detail.

<sup>10</sup> Segura, *Labor Stratification: the Chicana Experience* 29 BERKELEY JOURNAL OF SOCIOLOGY 60 (1984).

<sup>11</sup> *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269 (N.D. Cal. 1976).

<sup>12</sup> *Id.*

tions within the same company where they once held low-paying *women's* jobs. It is a fair guess that many of the Chicanas that trained for, and accepted, year-round warehouse, supervisory and mechanics jobs as a result of the consent decree would not have considered seeking that type of work outside of the canneries. If this is true, then litigation like *Alaniz* might be a more effective means of moving into nontraditional jobs women who are reticent about applying for such jobs.